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IN THE

Supreme Court of the United States,

OCTOBER TERM, 1925—No. 260.

PANAMA RAILROAD COMPANY,

Petitioner,

—against—

AGAPITO VASQUEZ, as Administrator of the Goods, Chattels and Credits which were of Maximiliano Sanchez,

Respondent.

BRIEF FOR RESPONDENT.

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Respondent.

RESPONDENT'S BRIEF.

A writ of certiorari has been granted to review judgment of the Court of Appeals of the State of New York which affirmed a judgment of the Appellate Division of the Second Department, which, in turn, affirmed a judgment of the Supreme Court in favor of this respondent against petitioner.

The action was by a seaman against his employer.

The sole question involved is whether, after the passage of the Jones Act, the courts of the several states have any jurisdiction to redress maritime tort on behalf of seamen against their employers.

Statement.

Maximiliano Sanchez, a seaman on the steamship "W. C. Gorgas", was killed on August 26, 1921, while

working on the vessel, which, at the time, was in floating drydock undergoing repairs. Sanchez was engaged in building a brick partition between two boilers. On account of the darkness he was provided with a portable electric light, having an ordinary unprotected bulb fastened to a socket at the end of a long black electric wire, stretched along the floor. The current for the light was conveyed to the vessel by direct connection from shore (Rec., pp. 11-15, 18, 19).

It was necessary in the progress of his work for Sanchez to move the light from one place to another, and while doing so a powerful voltage of electricity passed through his body and killed him instantly (Rec., p. 21).

The complaint alleged the employment of Sanchez by the defendant as a coal-passer aboard the vessel and the injury sustained by him while engaged in the employment aboard the vessel within the State of New York (Rec., p. 4). The complaint then alleges in paragraphs Sixth and Seventh in general terms, the violation of defendant's obligation and the negligent acts of the defendant which resulted in the injury complained of. In regard to the Jones Act, the complaint alleges in paragraph Eighth that thereby all statutes enacted in favor of railroad employees engaged in foreign or interstate commerce were made applicable to seamen employed upon the American vessels and that plaintiff, as the personal representative of the decedent, is entitled to recover damages for the negligence of the defendant (Rec., p. 5).

On the opening of the trial, the defendant moved to dismiss the complaint on the ground that the State courts had no jurisdiction. It was stated by the attorney for

the plaintiff that the suit was brought both under the Jones Act and the common law (Rec., p. 10).

It was shown that the decedent at the time of his death resided in Brooklyn, New York (Rec., p. 49).

At the end of the case the attorney for the defendant renewed his motion to dismiss (Rec., p. 108). The Court asked the attorney for the plaintiff whether he wanted the case submitted under the common law or the Jones Act. The attorney for the plaintiff contended that in the respects involved in this suit, the law was practically the same (Rec., p. 108).

The attorney for the defendant took no exception to any part of the charge of the Court on the subject of contributory negligence and made no request to charge based upon any possible distinction between the submission of the case under the common law or under the Jones Act (Rec., p. 116).

The record therefore presents in the broadest possible manner the question as to whether after the passage of the Jones Act, any power of enforcement survives in the State courts in seamen's cases of maritime tort.

POINT I.

The State Court had jurisdiction over the suit. Jurisdiction in the courts of the United States and in the courts of the several states to enforce the Jones Act is concurrent.

(a) *Jurisdiction of state courts to enforce maritime law, long recognized.*

In *The Hamilton*, 207 U. S. 398, this Court, at 404, said:

> "The grant of admiralty jurisdiction, followed and construed by the Judiciary Act of 1789, 'saving to suitors in all cases the right of a common law remedy where the common law is competent to give it', Rev. Stats. § 563, Cl. 8, leaves open the common law jurisdiction of the state courts over torts committed at sea. This, we believe, always has been admitted. *Martin* v. *Hunter*, 1 Wheat. 304, 337; *The Hine* v. *Trevor*, 4 Wall. 555, 571; *Leon* v. *Galceran*, 11 Wall. 185; *Manchester* v. *Massachusetts*, 139 U. S. 240, 262. And as the state courts in their decisions would follow their own notions about the law and might change them from time to time, it would be strange if the State might not make changes by its other mouthpiece, the Legislature. The same argument that deduces the legislative power of Congress from the jurisdiction of the National courts, tends to establish the legislative power of the State where Congress has not acted. Accordingly, it has been held that a statute giving damages for death caused by a tort might be enforced in a state court, although the tort was committed at sea. *American Steamboat Co.* v. *Chase*, 16 Wall. 522."

See also:

> *McDonald, as Adm.* v. *Mallory*, 77 N. Y. 546.

Cases holding that the general maritime law may not be radically changed by state statute are predicated on a jurisdiction in the state courts to enforce such law.

In *Knickerbocker Ice Co.* v. *Stewart*, 253 U. S. 149, this Court held that the provision of Section 9, Judiciary Code, 1789, granting to United States District Courts "exclusive original cognizance of all civil causes of admiralty and maritime jurisdiction * * *, saving to suitors, in all cases, the right to a common law remedy, where the common law is competent to give it" was a saving clause, and stated at page 159:

> "Thus we distinctly approved the view that the original saving clause conferred no substantive rights and did not authorize the States so to do. It referred only to remedies and to the extent specified *permitted continued enforcement by the state courts of rights and obligations founded on maritime law.*"

In *Ex Parte State of New York, No. 1*, 256 U. S. 490, this Court, at page 502, said:

> "The symmetry and harmony maintained in those cases consists in the uniform operation and effect of the characteristic principles and rules of the maritime law as a body of substantive law operative alike upon all who are subject to the jurisdiction of the admiralty, and binding upon other courts as well."

See also:

> *Chelentis* v. *Luckenbach S. S. Co.*, 247 U. S. 372, at 383;
> *Southern Pacific Co.* v. *Jensen*, 244 U. S. 205.

There should be no divesture or revocation, by implication or by anything other than express statute, of

this long recognized jurisdiction on the part of the courts of the several states. The Jones Act does not constitute a revocation, expressed or implied.

In *Patrone* v. *Howlett,* 237 N. Y. 394, the Court in this respect, at page 397, said:

> "The Jones Act gives a seaman an action at law in place of the common-law remedy reserved to him in addition to his action *in rem* in admiralty by the Judiciary Act of 1789. Prior to its passage he had the right to resort to the state courts whenever they were competent to give a remedy. It does not expressly or by necessary implication take away the right to resort to the state courts. It provides for the venue, when the action is brought in the United States court, and probably that is as far as it goes in defining jurisdiction."

In *Tammis* v. *Panama Railroad Co.,* 202 App. Div. 226, there is a careful and well-reasoned opinion of the Court to the same effect that there should be no revocation of authority by other than express terms of statute and that the Jones Act does not show any intention to divest state courts of previously exercised jurisdiction.

There is the strongest presumption against any such sweeping repeal or change where express words having such effect are not used in the statute.

> *Bookbinder* v. *United States,* 287 Fed. 790 (C. C. A. Third Cir.), at 792.

(b) *Concurrent enforcement fundamental and an essential feature of the Employers' Liability Act.*

The principle of concurrent enforcement is so fundamental that it may well be presumed in the absence of the clearly expressed statutory intent to the contrary.

In *Minnesota & St. Louis R. R.* v. *Bombolis*, 241 U. S. 211, this Court, at page 221, stated that it is an essential principle "upon which our dual constitutional system of government rests" that

> "lawful rights of the citizen, whether arising from a legitimate exercise of state or national power, unless excepted by express constitutional limitation or by valid legislation to that effect, are concurrently subject to be enforced in the courts of the state or nation when such rights come within the general scope of the jurisdiction conferred upon such courts, by the authority, state or nation, creating them. This principle was made the basis of the first Federal Judiciary Act and has prevailed in theory and practice ever since as to rights of every character, whether derived from constitutional grant or legislative enactment, state or national. In fact this theory and practice is but an expression of the principles underlying the Constitution and which cause the governments and courts of both the Nation and the several States not to be strange or foreign to each other in the broad sense of that word, but to be all courts of a common country, all within the orbit of their lawful authority being charged with the duty to safeguard and enforce the right of every citizen without reference to the particular exercise of governmental power from which the right may have arisen, if only the authority to enforce such right comes generally

within the scope of the jurisdiction conferred by the government creating them."

In *Galveston H. & S. A. Ry. Co.* v. *Wallace*, 223 U. S. 481, this Court, at 490, said:

> "And, considering the relation between the Federal and the State Government, there is no presumption that Congress intended to prevent state courts from exercising the general jurisdiction already possessed by them, and under which they had the power to hear and determine causes of action created by Federal statute. *Robb* v. *Connolly*, 111 U. S. 624, 637."

Where the subject matter of the legislation is the relationship between employer and employee, which may be expected to involve a large amount of litigation throughout the United States, the principle of concurrent enforcement is essential. In the Federal Employers' Liability Act, therefore, this principle is not left to implication but is set forth in specific terms. It is significant, moreover, that this Court has pointed out that concurrent enforcement thereof existed independent of its expression in the statute. In *Second Employers' Liability Cases*, 223 U. S. 1, at 56, this Court said:

> "This is emphasized by the amendment engrafted upon the original act in 1910, to the effect that 'The jurisdiction of the courts of the United States under this act shall be *concurrent with that of the courts of the several states*, and no case arising under this Act and brought in any state court of competent jurisdiction shall be removed to any court of the United States'. The amendment, as appears by its language, instead of

granting jurisdiction to the state courts, *presupposes that they already possessed it.*"

(c) *Congressional intent that enforcement of Jones Act be concurrent, manifest from the terms of the Act itself.*

In *Southern Pacific Co.* v. *Jensen*, 244 U. S. 205, at 213, this Court in the year 1917 held that the Federal Employers' Liability Act applied only where the injuries occurred in railroad operations and could not be extended to maritime transportation.

The problem before Congress was therefore either to create a new body of law having application to the relations between employer and employee aboard vessels or to extend an existing body of law to such closely analogous circumstances. The old body of law involved a relationship of master and servant in a particular class of carrier. The new body of law was to involve the same relationship in regard to another class of carrier. The old body of law had been found adequate and, in a multitude of decisions in the federal and in the state courts, had been applied in its various aspects. It was therefore natural that Congress should conclude to extend the old body of law to the new situation.

It will be borne in mind that at the time Congress determined to extend the provisions of the Federal Employers' Liability Act to seamen's cases, not only had the concurrency enforcement feature been recognized as fundamental and general, but it had been incorporated as an essential express provision in the Employers' Liability Act and had been given prominence by the decision of this Court.

The Jones Act thus provided (Act of March 4, 1915, Chap. 153, Sec. 20, as amended Act June 5, 1920, Chap. 250, Sec. 33) (Compiled Statutes, Sec. 8337a):

> "Any seaman who shall suffer personal injury in the course of his employment may, at his election, maintain an action for damages at law, with the right of trial by jury, and in such action *all statutes of the United States modifying or extending the common-law right or remedy in cases of personal injury to railway employees shall apply;* and in case of the death of any seaman as a result of any such personal injury the personal representative of such seaman may maintain an action for damages at law with the right of trial by jury, and in such action *all statutes of the United States conferring or regulating the right of action for death in the case of railway employees shall be applicable.* Jurisdiction in such actions shall be under the court of the district in which the defendant employer resides or in which his principal office is located."

The Jones Act thus, by reference, makes a part thereof *all* statutes of the United States modifying or extending the common-law *right* or *remedy* in cases of personal injuries to railway employees and, in death cases, repeats the incorporating reference: *"all* statutes of the United States *conferring* or *regulating* the right of action for death in the case of railway employees shall be applicable."

In each case the reference is all-inclusive. In the first case, the reference further identifies such statutes as involving both right and remedy. In the second in-

stance, the reference further identifies such statutes both as to rights conferred and rights regulated.

The main statute on the books upon this particular subject which Congress necessarily intended to incorporate was the Employers' Liability Act (Act, April 22, 1908, Chap. 149, Sections 1 to 9) (Compiled Statutes, Sections 8657-8665). Section 1 of this Employers' Liability Act relates to a general liability on the part of common carriers by railroad to employees for negligence. Section 2 is on the same subject. Section 3 deals with the subject of contributory negligence. Section 4 with the subject of assumption of risk. Section 5 declares void contracts exempting the carrier from liability under the Act. No one would have any justification for contending that these first five sections have not been made applicable, under the Jones Act, to actions by seamen.

Section 6 of the Employers' Liability Act provides as follows:

> "No action shall be maintained under this Act unless commenced within two years from the day the cause of action accrued.
>
> Under this Act an action may be brought in a (circuit court) of the United States, in the district of the residence of the defendant, or in which the cause of action arose, or in which the defendant shall be doing business at the time of commencing such action. *The jurisdiction of the courts of the United States under this Act shall be concurrent with that of the courts of the several States,* and no case arising under this Act and brought in any state court of competent

> jurisdiction shall be removed to any court of the United States."

The argument of petitioner must necessarily be that, although the first five sections of the Employers' Liability Act have under the terms of the Jones Act been made applicable to actions by seamen, nevertheless, the immediately following section, namely, Section 6 in the same statute, dealing with the same subject matter, has not been made applicable and that when Congress under the terms of the Jones Act made *all statutes* of this class applicable, for some reason this particular section was lifted out of these all-inclusive provisions.

Nothing in the terms of either Act justifies this deletion.

Furthermore, it will be noticed that Section 6 of the Employers' Liability Act is in two paragraphs. The first paragraph constitutes the statute of limitations. Certainly, petitioner cannot contend that this provision must not by reference be carried over and made applicable to actions by seamen. The argument of petitioner must therefore be narrowed to the contention that for some reason Section 6 was intended by Congress to be split in two and one-half of it drawn over by reference to actions by seamen, but that the second half of it, for some unexplained reason, must be cast out from the all-inclusive incorporating provisions.

The internal evidence not only furnishes no justification for such a contention but on the contrary establishes that Congress had in mind the incorporation of this particular Section 6 when, by the terms of the Jones Act, it made all statutes of the United States in the case of the railroad employees applicable. For Section

6 of the Employers' Liability Act contains among its various provisions certain features of venue appropriate to actions by railroad employees, but hardly fitting to suits brought by sailors. It provides that suit by the railroad employee may be brought in a (circuit court) of the United States (1) in the district of the residence of the defendant, or (2) in which the cause of action arose, or (3) in which the defendant shall be doing business at the time of commencing such action. In the case, however, of suits by seamen, where the cause of action in many cases might arise at sea, these venue provisions were obviously not entirely applicable. The Jones Act therefore sets forth venue provisions modifying in this sole respect the Employers' Liability Act and providing that actions be brought in the district (1) in which the defendant employer resides, or (2) in which his principal office is located.

There is no other modification of the Employers' Liability Act and more specifically there is no other modification of Section 6 of the Employers' Liability Act. No other modification was necessary. The provisions in regard to concurrency of enforcement expressly set forth in the Employers' Liability Act were not modified, but along with the statute of limitations set forth in the same section, were obviously included within the provisions made applicable by the all-inclusive reference. The defendant employer cannot pick and choose what provisions should be applicable when Congress has definitely stated they all should be applicable.

Where the concurrent enforcement features of the Employers' Liability Act are not in any way inconsistent with the provisions of the Jones Act incorporating them,

the Court is obligated to hold that they constitute a part of the Jones Act.

> *Daviess, et al.* v. *Fairbairn*, 3 How. 636, at 644.

Where this Court has held that the express concurrent enforcement features of the Employers' Liability Act constitute in effect a recognition of that which exists without them, and Congress thereafter incorporates all of such provisions in a later statute, there is no justification for this Court in then refusing to recognize what it has before recognized. Its decision in regard to the Employers' Liability Act on the contrary has in reality become a part of the re-enactment of the Employers' Liability Act into the Jones Act.

> *United States* v. *Hermanos y Compania*, 209 U. S. 337, at 339;
> *Copper Queen Mining Co.* v. *Arizona Board*, 206 U. S. 474, at 479;
> *New Haven R. R.* v. *Interstate Commerce Commission*, 200 U. S. 361, at 401, 402.

When the Employers' Liability Act had been for years enforced in the state courts and when Congress was extending it to seamen, it would have been peculiarly inapt not to have extended the feature of concurrent enforcement. There could be no adequate extension which omitted it.

(d) *The essential elements of concurrency of jurisdiction have been determined by this Court.*

The particular language of the Jones Act, which petitioner herein contends constitutes a grant of exclusive jurisdiction to the Federal Court and an elimination of jurisdiction in the state courts is as follows:

> "Jurisdiction in such actions shall be under the court of the district in which the defendant employer resides or in which his principal office is located."

This Court, however, has construed and has determined the meaning of this clause.

In *Panama R. R. Co.* v. *Johnson*, 264 U. S. 375, this Court, at page 384, held that this provision was "not happily worded" and determined that it affected venue rather than jurisdiction, saying:

> "A reading of the provision now before us with those sections, and in the light of the policy carried into them, makes it reasonably certain that the provision is not entitled to affect the general jurisdiction of the district courts as defined in Section 24 (Judicial Code) but only to prescribe the venue for actions brought under the new act of which it is a part. No reason why it should have a different purpose has been suggested, nor do we perceive any. Its use of the word 'jurisdiction' seems inapt, and therefore not of special significance. * * *
>
> By a long line of decisions, recently re-affirmed, it is settled that such a provision merely confers on the defendant a personal privilege which he may assert or may waive, at his election, and does waive if, when sued in another district, he enters a general appearance before or without claiming his privilege."

In *re East River Co.*, 266 U. S. 355, the Jones Act was again before this Court. Suit had been brought thereunder in the state court. An injunction had been brought to stay the action for matters not involving jurisdiction. This Court assumed that the state court had jurisdiction, at page 368, saying:

> "We answer these questions as they are asked and assume that the State Court had jurisdiction to try the case under the concluding words of the section: 'Jurisdiction in such actions shall be under the court of the district in which the defendant employer resides or in which his principal office is located.' For assuming that it had jurisdiction we have no doubt that the injunction may issue and that the statute regarding limitation of liability of ship owners has not been repealed so far as claims like the present are concerned."

The Federal courts after a preliminary period of uncertainty have now recognized the concurrent jurisdiction of the state courts under the Jones Act and have furthermore recognized that under the provisions of the Employers' Liability Act, by terms made applicable, suits in the state courts should not be removed to the Federal court.

Atianza v. *United States Shipping Board*, 3 F. (2d) 845;
Beer v. *Clyde S. S. Co.*, 300 Fed. 561;
Herrera v. *Pan-American*, 300 Fed. 563;
Reyes v. *United States Shipping Board*, 299 Fed. 957;
Martin v. *United States Shipping Board*, 1 F. (2d) 603.

Some Federal decisions, although they have held that suits in the state courts are removable, nevertheless, have held that jurisdiction is also in the state court.

> *Petterson* v. *Hobbs, Wall & Co.,* 300 Fed. 811, at 812.

We cannot agree with petitioner in its statement at page 5 of its brief that *Wenzler* v. *Robin S. S. Co.,* 277 Fed. 812, at 817, holds that jurisdiction in the Federal courts is exclusive. On the contrary, the Court, at 817 and 818, said:

> "The extent to which it (Congress) may or may not confer jurisdiction over Federal questions upon the state court it is not necessary to consider. The jurisdiction of the state courts being general in its nature, that general jurisdiction may be so far recognized by Congress by legislation concerning the enforcement of rights arising out of Federal law as to leave the door of the state court open to the litigant. * * * Congress did not seek to confer a power, but rather to leave undisturbed any rights to sue at common law, including the right to sue in a state tribunal."

Nor can we agree with the petitioner in its statement at page 5 of its brief that the case of *Barrington* v. *Pacific S. S. Co.,* 282 Fed. 900, held that jurisdiction was exclusive in the Federal courts, for it would appear that the decision in that case was merely that one district of the Federal court (as distinguished from another district of the Federal court) did not have jurisdiction.

The third case cited by petitioner at page 5 of its brief as holding that jurisdiction in the Federal court is exclusive, namely, the case of *Lorang* v. *Alaska S. S. Co.*, 298 Fed. 547, did hold that jurisdiction in the Federal court was exclusive, but Judge Neterer, who wrote the opinion therein, later changed his view and, in the case of *Cook* v. *Alaska S. S. Co.*, 8 F. (2d) 207, remanded the case brought under the Jones Act to the state court, as stated at page 6 of petitioner's brief.

State courts have exercised jurisdiction to enforce the Jones Act.

Tammis v. *Panama Rd.*, 202 App. Div. 226;
Lynott as adm. v. *Great Lake Transit*, 202 App. Div. 613 (Aff. 234 N. Y. 626);
Bennett as adm. v. *Connelly*, 122 Misc. 149 (Aff. 208 App. Div. 852);
Engel v. *Davenport*, 67 Cal. Dec. 325, on rehearing (now before this Court on certioriari). 194 Cal - 344

POINT II.

Judgment should be affirmed, with costs.

Respectfully submitted,

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